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PRINCIPLES OF MORAL LEGISLATION.

A. K. ROGERS.

IN what sense, or to what degree, is it the proper business of the state to, as we say, promote morality? It is notoriously difficult to answer this in a principled way, and the temptation has, therefore, been to leave it unanswered, and to deal with questions of repressive moral legislation piecemeal, each on its own merits. This, however, has practical as well as theoretical disadvantages, and we should clearly be better off if we could lay down limiting conditions as a suggestive guide for legislative programs. I shall, therefore, in the present article, be concerned, not with the merits of this or that reform in particular, but with the general logic of a certain theory of state action. I shall assume as my hypothesis that the business of the state is, neither to compel its citizens to live the life it thinks to their, or its, advantage, nor to encourage a general competitive scramble in the interests of an abstract "liberty," but to provide the positive conditions under which a good and satisfying life is open to all alike, leaving, however, the individual man to take advantage of these in the degree to which his own inclinations may prompt him. And what I wish to do is to inquire whether one can deduce from such a standpoint anything to throw light upon the question as to just *how far* it is desirable for the state to go in its interference with the "moral" habits of the citizen.

It is evident that the principle of "freedom of opportunity" creates a certain presumption to begin with in favor of leaving men to work out their own salvation; it puts the burden of proof on a proposal for active interference. I am not unaware that there is a plausible turn to be given to the conception of freedom which would reverse this declaration. Is a man really at liberty to use his powers to the utmost when he weakens them by personal habits that are harmful—drink or debauchery,—or throws away in gambling the money that might have been used to

extend his business? If not—and clearly the answer must be in the negative,—then the more by state action we remove from him the temptation to such indulgences, the more we enlarge rather than contract his freedom. Now the point that is questionable here is on the surface. Doubtless it is so, morally speaking, that no man has the perfect use of himself who is not strong enough to keep from under the control of vicious habits. But it does not follow forthwith that, therefore, the state ought to perform the task for him. This might follow if we had sound reason to believe that the state *could* do it successfully. But nothing is more certain than that the endeavor of the state directly to make men moral is of doubtful issue. It may induce, through lack of opportunity to go astray, habits of living that outwardly are more correct. Even this is not an inevitable result; it *may* lead rather to an underhanded and consequently more vicious gratification of the tendencies that are forbidden. But even where apparently it works, there are most commonly coincident ill effects, in the encouragement of a passive moral temper which is out of line with any social ideal other than that of mere regularity and decorum.

Now in view of the psychological limitations of the practice of public moralization, and in view also of that ever-present disposition to enforce personal standards, and compress human growth within the boundaries of our own possibly very short-sighted and puritanical notions of what is right or wrong, it seems inadvisable to leave moral legislation to a mere spontaneous sense of fitness, with no principled guidance. On the other hand, I do not think that our natural predilections here are to be ignored. Undoubtedly, even with no well-considered theory to oppose to it, men have very widely hesitated to accept the laissez-faire attitude toward moral legislation, simply because their moral interests did not seem to be sufficiently placated by its apparent indifference to the value of the ethical life. Consistently with theory or not, they have felt impelled to try to do something here just because the

matter was so important. And the tendency has been encouraged by one obviously weak point in the negative theory,—the impossibility of fencing off certain vices as private, as if they had no consequences in the way of public injury. A habit which affects only oneself hardly exists for a man unless he lives quite isolated from his fellows. Nevertheless the very universality of this statement indicates again the need for caution, and for some principle of distinction which does not leave *any* injury to others a proper ground for legislation; for as injury of some sort always can be found if we look for it, we might then find ourselves on the road to a universal social meddling. And as determining, at least, the general location of emphasis, the principle of opportunity would, therefore, again, seem to lay it down that, in proportion as a habit would popularly be classed as private, we should start from the idea of freedom and non-interference. It still, of course, remains to find the right qualifications to this; but at least we are able to guard now, as we otherwise could not have guarded, against the danger of passing over inadvertently to a dubious paternalism.

Now for the formative period of life, in the first place, it is an obvious corollary to any scheme of education which works in practice, that there should be protection in some considerable measure from influences detrimental to character. Sensible laws which aim, therefore, to prevent undue temptation of the young offer little cause for serious demur. To forbid the sale of intoxicants or tobacco to boys may readily be justified, whatever one thinks about it in the case of those who have supposedly reached years of discretion. It is true that even on the basis of age the line that has to be drawn between minors and responsible adults is in a measure arbitrary. But at least there is a general principle of separation here about which there is no real dispute; and although within narrow limits there may be a doubt about the proper dividing line, the application can at any rate be carried out by rule, whereas in any attempt to draw a moral line between adults, it would have

to be left to that very questionable source of decision—the judgment of one man on the inner character and capacities of another, undistinguished by well-defined objective marks. And the connecting of the habit of mind which this encourages with power to carry its judgment into effect, is too great a menace to the general freedom to be lightly entertained, even if the moral benefit to the person under discipline were much more certain than it is. And it is true, furthermore, that the principle might readily be pressed too far, so as to break down the distinction it was intended to help establish. The needs of the “young person” can be used to set a standard which is then imposed upon all, on the plea that otherwise we cannot be sure of guarding completely such as need protection; and the danger of this should lead us to scrutinize very carefully any proposal in particular. When the evil is in a form so pervasive as to force itself on the passer-by, then, indeed, there may be reasonable ground for endeavoring to suppress it entirely. But this does not apply with anything like necessity except to cases where the evils are in the realm of thought or imagination, and only indirectly of outward act. Public appeals to sensuality through the eye or ear represent the most obvious instance of this class; and they may quite properly be eliminated on the ground of their danger to the young, if there are no other reasons. But there is no great force to such an argument in the case of most things that are popularly condemned as vices. Here the hurt comes rather in the event of actual use, which commonly involves a definite act of purchase; and a law that shall prevent such purchase by minors is entirely feasible. Of course it stands a chance of becoming a dead letter, and will only be saved from this by the force of public opinion. But if public opinion is not strong enough to enforce it, it certainly will not be strong enough to enforce a still more drastic attempt to make the prohibition universal.

This conclusion may be applied to two cases in particular—books, and the theatre. The two are alike in that

they both bring up the difficult problem of a moral censorship; for here it is not a question at all of the product as such, but only of distinguishing in the product between the good and the bad. The difficulties in the way of the successful attainment of this end are so obvious in practice, that even apart from the theoretical question of the right of society to regulate the moral tastes of its citizens, there would be sufficient reason to examine any proposal looking toward it very carefully indeed. It appears from experience that the almost inevitable tendency of the civic censor is not only to act fitfully and unsystematically, but also to exhibit much greater alarm at a serious discussion in terms of ideas, than at frank salaciousness. One reason for this, especially in connection with the theatre, is the financial one, as was rather naively admitted by the English censor not long ago; a musical comedy represents a much larger expenditure usually than a problem play,—the property rights of the author being of course to the official mind a negligible matter. Furthermore, if this irresponsibility of the censor could be remedied by public opinion, it is altogether likely in practice that things would go to an extreme, and that an attempt to catch every offender would result in interfering with the virility of literature and the drama. It is quite true that if, as the logic of the libertarian theory might suggest, the theatre were left practically to itself to supply what it can find patrons to enjoy, and if it is frankly admitted that when a full grown man wants to fill his mind with nastiness he shall be permitted to do so, so long as this is not intruded on others who have different tastes, then in case we also make the reasonable requirement that it shall close its doors to all save adults as its price for immunity, this also would require an intelligent censorship. But the practical task of the censor would be greatly lightened. There would be no particular objection here to the policy which in its more general application would be so obnoxious—the presumption that a play must be beyond suspicion if its audience is not to be restricted to responsible adults. And there is no particular reason to think, either,

that such a law would call forth any general antagonism to hinder the censor in the performance of his duties. The complaint in behalf of the freedom of letters would lose its point; indeed the policy would be of service to such freedom, by removing the paramount influence of the "young persons"; while the ordinary man who wishes to enjoy himself in this particular way, would commonly be ready to admit that it is very likely not a good way for the young. And indirectly such a policy might conceivably diminish the nastiness of the stage, for a manager would think twice before cutting himself off from so considerable a proportion of his audience as is supplied by adolescents.

In the case of written literature the situation is not quite the same, owing to the fact that a boy cannot so readily be prevented from buying a book as from securing a seat in a playhouse. But at the same time the possible danger of emasculating the intellectual life is very much greater, apart from an intelligence and insight in the censor which there seems only a small chance of securing. Meanwhile we are apt to forget that there is another factor—the responsibility of the parent. There will be left sources of contamination, no doubt, in plenty; but any ideal of a completely innocuous atmosphere for the young is on the surface rather Utopian.

One would perhaps feel more comfortable theoretically if he could stop here, and, having protected youth, leave men to their own devices. But while evidently we cannot treat men as children, it does not seem altogether satisfactory to say that even in their case the state has no concern whatever with morality. The common sense of mankind has always inclined to reject such an outright denial. Assuming that the moral life is only another expression for the really good and desirable sort of life, then the state, if it is concerned with making this concretely possible, must provide the conditions which give it a real chance to be attained. Now morality requires ordinarily a certain kind of environment, or it will not come to growth. A slum dweller may, exceptionally, turn out a decent man; but

we have no right to expect it, and the chances are the other way. If the state is concerned with the reality of liberty, and not the name merely, it must see to it that the environment is favorable, or at least not too unfavorable. It must leave a man free to make a fool of himself if he chooses; but it is not necessary that special facilities be provided. It is interested, therefore, in having the citizen surrounded with agencies that have a tendency to develop the good that is in him; and—what in the present connection is most pertinent—it must take care that he is not subjected to too strong and persistent temptations. Notice this does not say that the state is to tell a man that he shall not form a so-called bad habit, and that he will be punished if he does. It does not look directly to the individual, but to the circumstances of his environment; and it says that these shall not be allowed to take a form which make it inherently improbable that men generally will have the strength and motive to resist incitements to evil. Accordingly it concerns in the first instance the organized and commercial purveyance of vices, rather than the personal indulgence in them.

Now the public interest in this is probably too clear to need much argument. The gambling house, the saloon, the brothel, are almost inevitably encouragers of violence and fraud as well; and under such conditions the right, not to private indulgence, but to make money by encouraging vices in others, is no necessary corollary of the theory of freedom. Interference of some sort is demanded; and if it is found that, to be successful, this has to go the length of total prohibition, there seems no serious theoretical objection. To be sure, incidentally this curtails to some extent personal liberty; but it does this only to an extent. It does not say that a man shall not, for example, bet, or play for stakes, but only that he shall not do this under specified surroundings which have proved to be prejudicial to public order in ways obvious and already in principle forbidden by the law. Of the three cases mentioned, the brothel perhaps shows the strongest case for prohibition.

The professional side of sexual vice is sure to develop features difficult to handle in the way of mere regulation. In the nature of the case it cannot advertise itself without interfering with certain fair claims on the part of decent citizens, in which the rights of the young again play an evident part. So the location of prostitutes in respectable neighborhoods is a thing clearly prejudicial to the interests of self respecting residents, while the alternative of segregating vice presents also drawbacks of an obvious character. And a further element is the danger to public health. Gambling houses also are hard to regulate. It is difficult, without a degree of interference that almost makes the state a partner, to secure immunity from fraud; while the emotional excess which games of chance foster is so stimulated in public gambling, and the consequent temptation to pecuniary dishonesty is so great, that the prevalent tendency to forbid it as a business enterprise seems not difficult to defend theoretically.

The case against the saloon is weaker. It is true that there is one public evil attendant on the business side of vice which in connection with the saloon is particularly acute. This is the fact that, as things go, provision for the indulgence of so-called vices are intimately mixed up with political evils that call for regulation. This makes of the saloon or public drinking place a problem quite over and above the problem of the evils of drinking; and it is this perhaps as much as anything that has led recently to a vigorous recrudescence of the policy of prohibition as the most effective weapon against lawless forces. The ground here is, again, not the viciousness of drunkenness, but the evils of corrupt political combinations based on the coarser passions; and it might at least be said in favor of the necessity, that in the nature of the case such a business has a leaning toward underhand and undesirable methods, from which it is the less likely to be restrained the more the sense of public disapprobation tends to confine it to men with no very nice moral scruples. But on the other hand it is to be remarked that nuisances here, on the public side,

it is by no means inconceivable that we should be able to minimize by regulation. Furthermore, it is a real difficulty that the elimination of the saloon, without the total prohibition of the liquor traffic in every form, involves an element of discrimination, since the rich still have their clubs which it is extremely hard for the law to reach; and anything which in practice is forbidden to the poor while it is permitted the well-to-do, is certain to make trouble.

Before, however, taking up briefly the theoretical case for the more drastic policy of complete prohibition, it will be convenient to say a few words about that aspect of the general situation which brings us back to the individual person. The previous considerations bear immediately, as I have said, on the business, and not on the more personal side of vice, except as in a somewhat indefinite way they stand for the need of making the environment such as will not foredoom the average citizen to exposure to temptation in a form too strong and omnipresent to justify the probability that he will not succumb. And as such, they present a stronger case than do proposals which have the individual directly in mind—the proposal to forbid betting between private persons, or the buying and drinking of a bottle of beer. It remains to consider whether there is any way to justify the state in extending its authority in this direction also. And the one undisputed point is this, that vices may legitimately be punished when they infringe the rights of others. But here, of course, it is not really the vice which is attacked, but the resulting injuries, although a systematic campaign in this direction would undoubtedly have an effect in checking the vice as well. The debatable question is, however, what we are to consider an injury which violates a right, since there are many injuries which are clearly not of this sort. And it seems to me that in order to be on the safe side we shall clearly have to rule out all those impalpable injuries to the feelings and the moral prejudices of others, and the vague diffused injuries to the public which cannot be definitely located, and to confine the operation of the

principle to the things that work harm in obvious and recognized ways to individuals. These are, first, actual interference with the physical welfare of others, such as at present comes within the reach of the law. In the form of violence, this applies chiefly to drunkenness. Of course the penalty here, as elsewhere, must await the commission of the deed; but when this occurs, it might well be punished severely, and drunkenness not taken as, rather, an excuse. And it would seem defensible to go beyond this, and when once a man has been guilty of such an act to make him a special subject for restrictive legislation, in order to avoid the second time what has been shown to be a reasonable chance. But there is also a more general ground for legislation. Drunkenness is to most people a serious nuisance, interfering sensibly with their comfort and feeling of security. The forbidding of nuisances is a recognized public policy, and can easily be applied to intoxication in public places. To have a drunken man patting one on the shoulder and indulging in maudlin conversation is unpleasant for a self respecting man; and the situation often is intolerable for women. Here also the saloon which turns out an intoxicated man on the street might well be asked to share the penalty.

The second ground of state action is where the injury is a definite violation of some obligation voluntarily undertaken. One can scarcely punish a man for spending his money foolishly even to his own hurt; but when this entails harm in the way of inability to meet recognized demands, to his creditors or his family, there would seem no inconsistency in bringing social pressure to bear. A man who is failing in the support of his children can with more obvious justice be constrained to mend his ways, than a bachelor whose delinquencies will only in an indirect and diffused manner bring harm to his fellows.

The same principle of injury inflicted supplies the only suggestion I have to make as to the manner of dealing with the sexual relation on its individual and personal side. A basis on which society is justified in penalizing irregular

relations between the sexes is not altogether easy to come at. It may forbid forms which constitute a public nuisance; but this hardly touches the essence of the problem. So also the principle of duties assumed in marriage, and, more particularly, the clear right of children to be protected, will necessitate some safeguard to the institution of marriage and the family, in the way at least of insuring that reasonable financial obligations are met. But at this point is certain to come in a disposition to go further, and to enlarge the scope of state interference by appealing to vaguer and more indefinite claims, based on the supposed "sanctity" of the family relations, and the spiritual interests of society. But here we are passing into the realm of generalities where it is next to impossible to lay down any limiting clauses that will hold. We do not owe duties ultimately to institutions, nor do they possess rights as against us. The whole point I am trying to maintain is that such claims should be localized and particularized before they pass scrutiny. Under any form of marriage law, both parties are bound to take upon themselves at least a minimum of obligation consciously implied in undergoing the marriage ceremony. So also relationships which adult persons choose to assume when both are legally free, will automatically create obligations in case children happen to be born. But aside from this, if persons who supposedly are old enough to know what they want choose deliberately to follow their own path, it is hard to see how the state gets its right to say anything to them. It may be that the "sanctity of the family" has to others a definite meaning such as can be made a source of political obligation. But for my own part, when I try to get away from generalities, and to locate the precise claim which it may be supposed to exert upon me, I find no plain answer except this, that I am to be kept forcibly to certain lines of conduct to the end that I may *set a good example* to my fellows, and not discredit in their minds an estimable institution. But few principles need a more suspicious scrutiny than that which lays it upon me always so to act

as not to shock the accepted expression of public opinion which corresponds roughly to the average welfare. The habit of acquiescing on grounds of abstract and average good which are lacking in direct personal appeal, is one of the strongest reasons why in questions that really matter it is so difficult to get men to take an attitude of self-assertion against the *status quo*, in whose favor it is always possible to adduce plausibly such general recommendations. The consequence is that things are likely to persist for which no one in particular stands sponsor, but which get an illusory support because each person takes for granted an assumed benefit to the rest. Thus few men profess to find in the conventional forms of social gathering anything personally worth their while but they continue to patronize them on the ground that otherwise the usages of society could not be kept up; they bore themselves, in other words, to the intent that people may be given further chances to bore themselves in the future. And even granting that we have an institution of honest or even paramount social value, it is quite within the realm of moral possibility that it is not the best for all in all possible cases; and to shut off arbitrarily the right to judge for oneself is a dangerous moral precedent. If violating a general rule will mean definite injury to individuals who can be identified, then the rule may be enforced. But in so far as it concerns directly only the man himself and other individuals who voluntarily consent, then the plea of setting an example is absolutely irrelevant. What may I not be called upon to do, if to set a good example is a part of my legal obligation?

But now one such definite element of injury exists in the case of the sexual relations, of which it seems possible that more might be made than has commonly been done. As a source of disease, which moreover is certain in the end to fall upon the innocent along with the guilty, it renders itself liable to social interference. The traditional method here of refusing a permit save on the basis of medical examination has the obvious drawback that it

gives to a highly doubtful situation a quasi-legal standing; and also by making vice safer it may seem to encourage rather than to check it. It might be more effective, as it certainly could be more easily justified in theory, if instead of aiming directly at health, one were to fall back on the simple legal standard of injury inflicted. To punish severely any person who was shown to have communicated disease, would be in accord with the simplest principles of justice; and it might with sufficient public and medical opinion back of it be capable of being put into effect. Theoretically its advantage would be that it separates sharply the question of injury from that of vice, while at the same time it frees the state from even apparent complicity in a dubious traffic.

The general outcome is, then, that while the business side of vice is a matter which the state must necessarily take in charge, and in connection with which it may readily be allowed a rather free hand, the personal side, in so far as this still is possible when organized purveyance is restricted, may well be left to individual taste, unless it leads to acts which independently come within the restrictive powers of the state. Now in two of the three main cases—gambling and sexual irregularity—the possibility of the act would still remain even if it were wholly prohibited in the form of an organized business. The third case, however, that of the liquor habit, stands on a partially different footing, since a total prohibition of the liquor traffic would totally prohibit drinking also, and so result in a far-reaching interference with the personal habits of the citizen. Over against this, however, there is one new consideration of a general sort which, though it is extremely difficult to measure, can hardly be left out of account. I have objected to introducing vague and unlocalized public consequences as a reason for interfering with liberty; but such consequences conceivably may attain a magnitude which causes them to take on in a secondary way a specific form, even if they cannot be connected directly with individual harm. Thus the waste of

money spent on vices is in general no decisive point. Money can be wasted in any number of ways; and experience shows the futility of attempts to legislate personal economy. But a given form of waste might conceivably become so vast as visibly to endanger the industrial efficiency of a country; and in such a case the government would be compelled to deal drastically with it. Or, a vice might become so prevalent as to undermine the health and manhood of the nation, in a way to endanger, for example, its safety in case of war. It would, for example, seem a somewhat captious insistence on the abstraction of liberty to object to the Chinese prohibition of opium. Once more, such an argument is not to be taken as applying generally; but it does apply to an evil when it reaches a certain indefinite magnitude.

Now in America, intemperance is the only vice that at present can reasonably be supposed to stand on such a footing. The same danger might exist in the case of sexual immorality. Prostitution might reach a degree of excess which would threaten the destruction of the population. Or the passion for gambling might become so prevalent as to destroy the habits of industry necessary to the national life. But neither of these things is as a matter of fact true with us, whereas a considerable number of people are convinced that the diffusive effects of alcohol are such that the vital interests of the country are at stake. And the coincidence of opium and alcohol suggests another aspect of the situation which can be used to back the contention. The whole justification of liberty is based on the presumption that men generally are capable of resisting temptation. While some will always prove too weak for this, that is a chance which nevertheless has to be taken to secure conditions for a desirable development of character; and the general trend will be toward a growth of self control. But what if the habit is such as in its very nature to have a tendency, more or less pronounced, toward weakening self control? Of course any bad habit, indulged in, will grow less easy to resist; but the peculiarity here is

that the object itself which ministers to the habit, physiologically, and through its natural properties, occasions a general deterioration of the power of the will. Of course, often the tendency will not be consummated. But nevertheless the risk is present; and this is a matter not of mere moral opinion, but of science. May it not, then, put such habits in a class by themselves, and in view of the undoubted mass of attendant evils, counsel total suppression as a matter of caution? Such an argument applies much less clearly to alcohol than it does to opium or similar drugs, for which last also it is far less easy to make out a case on the ground of a positive value for human life; but it does apply in a measure to alcohol also. How strong the argument will seem, depends wholly on one's total impression of the greatness of the evils following from the traffic; and as there is no definite standard conceivable by which to judge this authoritatively, we may expect to see opinions continuing to differ, even supposing men should be able to agree on the general principle. It remains true, however, that on the formula I am defending the burden of proof rests distinctly on the advocate of total prohibition.

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